

IN THE HIGH COURT OF BOMBAY AT GOA

WRIT PETITION NO. 285 OF 2002.

1. Vinayak Balkrishna Redkar.
2. Smt. Surekha Redkar,
both residing near Mahalaxmi
Temple, Altinho, Panaji, Goa. ... Petitioners.

VERSUS

1. Shri Gurunath Ganesh REDkar
residing at Redkar Building,
Opposite Railway Station,
Curchorem, Goa.
2. Smt. Mahananda Vinayak
Malvankar, resident of
Caisua, Bardez, Goa.
3. Mrs. Vimal Krishna Bhat.
4. Shri Datta Krishna Bhat.
5. Shri Shivanand Krishna Bhat.
6. Sudha Krishna Bhat,
all residents of Care Mrs.
Vimal Krishna Bhat,
House No.126, Near Mahalaxmi
Temple, Panaji, Goa. ... Respondents.

Mr. M.S. Sonak, Advocate for the Petitioners.

Mr. A.D. Bhobe, Advocate for the Respondent No.1.

CORAM: P. V KAKADE, J.

DATE: 5TH DECEMBER, 2002.

ORAL JUDGMENT:

Rule. Rule made returnable forthwith by
consent of the parties.

2. The petitioners have filed this Writ
Petition against the Order dated 13th October, 2001

passed by the Civil Judge S.D., Quepem rejecting the petitioners' application (Exh.85) for cross-examination of Respondent No.1 who was D.W.1 in the suit.

3. I have heard Mr. Sonak, the learned counsel for the petitioners and Mr. A.D. Bhobe, learned counsel for the respondent No.1, with whose help I have also perused the entire record.

4. The suit was filed by the plaintiffs for declaration and other reliefs, whereas the defendant had filed counter claim along with the written statement and prayed that the plaintiffs be directed to specifically perform the suit Agreement dated 6.4.1969 by executing the Sale Deed in their favour. During the said proceeding, both the original plaintiffs expired and the legal heirs were not brought on record and, as such, the suit abated. However, as there is a counter claim, the defendant filed an application to bring the L.Rs. of the deceased plaintiffs on record. The said application was considered by the lower Court and notices were issued to the respective L.Rs. Subsequently, the L.Rs. were served, but some of them appeared before the Court through their counsel. Thereafter the matter was posted for evidence of the defendant as far

as the counter claim was concerned.

In the course of the said proceeding, the evidence of the defendant was recorded on 16.7.2001 and on that day none of the L.Rs. of the plaintiffs remained present. Therefore the cross-examination of D.W.1 as far as the plaintiffs was concerned was closed. The matter was kept on 31.7.2001 when the counsel for the defendant stated that he did not want to examine any more witnesses. On that day also the L.Rs. of the plaintiffs remained absent and the matter was closed for arguments. In the meantime there were proposals of settlement between the parties and therefore the matter got prolonged. However, on 24.8.2001 an application (Exh.85) was filed by the legal representatives of the plaintiffs requesting the Court to permit them to cross-examine the witness for the defendant. In the said application being moved under the provisions of Order 9, Rule 7 of C.P. Code for setting aside the ex-parte order, the learned Trial Judge came to the conclusion after hearing the parties that the provisions of Order 9, Rule 7 of C.P. Code was not applicable to the present case. According to him, the matter was adjourned on 31.7.2001 on which date the L.Rs. of the plaintiffs failed to appear and file any application. Thereafter on request of the defendant's counsel, the case was

closed for the defence and the matter was fixed for final arguments/judgment. According to the learned Trial Judge this aspect clearly showed that the hearing of the counter claim proceeding was over on 31.7.2001 and the impugned application filed by the petitioners was moved on 24.8.2001, whereas the matter was posted on 30.8.2001 for discussion of the proposal given by the counsel on behalf of the owner of the property. In view of this position, the learned Trial Judge came to the conclusion that the application for permission to cross-examine the defendant's witness filed by the petitioners was liable to be dismissed as the proceeding was closed for arguments. The learned Trial Judge has also recorded that there is no stage in the C.P.C. for filing arguments and therefore it must be held that the proceeding was closed for judgment and therefore it could not be reopened.

5. In support of this version he has sought to rely upon the Supreme Court ruling in the case of **Arjun Singh v. Mahindra Kumar** (A.I.R. 1964 S.C., 993). Relying on the ratio laid down by the said ruling, it is observed by the learned Trial Judge that the technicalities should not prevail, however, the Court is bound by certain provisions of procedure which cannot be lightly interfered with specifically when the parties are negligent and provisions of law

or procedure does not support the contention raised by such party. According to him provisions of Order 9, Rule 7 of C.P. Code is not applicable to the situation and, as such, the application moved by the petitioners was liable to be rejected.

6. Having heard both the parties and having considered the relevant aspects involved in this matter, I must note that the ratio laid down in **Arjun Singh's** case (supra) is that where the hearing of the suit has been completed and the Court being competent to pronounce Judgement then and there, adjourns the suit merely for the purpose of pronouncing judgment under Order 20 Rule 1 of C.P.Code, there is clearly no adjournment of "the hearing" of the suit, for there is nothing more to be heard in the said suit and therefore in such case Order 9, Rule 7 of C.P. Code cannot have any application. In my considered view, there cannot be two opinions regarding this ratio. However, it must also be borne in mind that the facts involved in **Arjun Singh's** case (supra) can very well be distinguished on facts. In the present case before us the roznama clearly shows that the suit was not adjourned merely for judgment. The suit was adjourned for arguments which would show that the hearing of the suit was not complete at the stage when the application of the petitioners praying for

cross-examination of defendant's witness was made. In view of this situation, I am of the view that the rejection of the application by the Trial Judge on the basis of the ratio of **Arjun Singh's** case (supra) would not be justified. In this regard note has to be taken of the ruling of our High Court in the case of **M/s. Bansilal Mittal v. M/s. J.R. Kraft Board Pvt. Ltd.** (1981 Bom. C.R., 875). Therefore in my view the ratio of the decision of the Supreme Court in the said case will not be attracted to the case where the hearing is not complete as in the present case where the arguments were yet to be heard. It would have been a different matter if the matter was fully heard and merely posted for judgment and nothing more.

7. In view of this situation, the Rule is made absolute. The Order dated 13th October, 2001 passed by the Civil Judge S.D., Quepem is hereby set aside. It is further directed that the learned Civil Judge S.D. shall consider the said application on merits afresh after giving an opportunity to both the sides, in the light of the observations made hereunder.

8. With these directions, the petition stands disposed of.

sl.

P. V. KAKADE, J.